No. 87-1252

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

H.J., INC., a Minnesota corporation,
KIRK DAHL, LARRY KRUGEN and MARY KRUGEN,
individually and d/b/a PHOTO IMAGES, SUSAN DAVIS,
ROBERT NEAL, ISAAC F. WARD,
RICHARD L. ANDERSON, THOMAS J. MOTT,
and all others similarly situated,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY,
a subsidiary of U.S. WEST, A. B. C.
individually and D. E. F. as corporations,
and other unnamed Co-conspirators,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of Trial Lawyers for Public Justice, P.C. (TLPJ).* TLPJ is a public interest law firm

*The assistance in the preparation of this brief of law students Joseph J. Karaszewski (Notre Dame '88) and Thomas J. Antonini (Notre Dame '88) is hereby acknowledged.

devoted to representing victims of corporate or government abuse in cases that have the potential for advancing the state of the law, for educating the public, for modifying corporate or government behavior, or for improving the access of victims to justice and compensation for the wrongs that have been done them. Supported by over 550 trial lawyers in 44 states and the District of Columbia, it is the only public interest law firm in the country dedicated to using plaintiffs' tort and trial law for the public good. TLPJ has pioneered in cases involving toxic dumping, water pollution, sex discrimination, experimentation using unwitting human guinea pigs, the protection and compensation of whistleblowers, lead paint poisoning of inner-city children, and unsafe automobiles and all-terrain vehicles.

TLPJ has found the Racketeer Influenced and Corrupt Organizations Act (RICO) to be the only remedy that a wide range of the American people, from small business through the elderly, have to obtain adequate redress for being cheated in the many criminal ways that the unscrupulous use. TLPJ wants to be sure that the access to justice and to compensation that Congress provided in the civil remedy provision of RICO, 18 U.S.C. § 1964, is neither narrowed nor foreclosed, but rather is nurtured and interpreted in keeping with its remedial purpose.

SUMMARY OF ARGUMENT

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Congress deliberately crafted a broad statute in an attempt to deal with the pervasive problem of organized crime. Congress, however, consciously did not limit RICO to organized crime figures; it made it applicable to all who violate its provisions. In enacting RICO, Congress was concerned with a variety of forms of

criminal conduct, including fraud. Nothing that has happened since undermines Congress' 1970 judgment. Fraud costs the nation billions of dollars annually. It victimizes small businesses, savers, investors, homeowners, the elderly, consumers, and federal, state, and local governments. Attempts to narrow RICO because of a fear of a litigation explosion are misplaced factually and are constitutionally inappropriate. This Court ought to adopt a straightforward definition of "pattern" that reflects RICO's text, legislative history and policy. It should be at least as broad as the definition in 18 U.S.C. § 3575(e), which this Court noted favorably in *Sedima's* footnote 14.

ARGUMENT

I. CONGRESS DELIBERATELY CRAFTED RICO AS A BROAD REMEDY FOR VICTIMS OF CRIME

A. RICO Was Intended to Apply to Both Legitimate and Illegitimate Enterprises.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as RICO.[1] The "legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983). "[T]he major purpose of Title IX . . . [was] to address the infiltration of legitimate business by organized crime." *United States v.*

[1] 18 U.S.C. §§ 1961-1968 (1982). *See generally*, Blakey & Cessar, *Equitable Relief Under Civil RICO*, 62 Notre Dame L. Rev. 526 (1987) (cited as *Equitable Relief*); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 Temple L.Q. 1009 (1980) (cited as *Basic Concepts*); Blakey, *The RICO Civil Fraud Action in Context*, 58 Notre Dame L. Rev. 237 (1982) (cited as *Civil Action*).

Turkette, 452 U.S. 576, 591 (1981). But "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." 452 U.S. at 590. "[R]ejected [also has been the] notion [that RICO] applies only to organized crime in the 'classic mobster' sense." *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980). As this Court recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985): legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Id.* In addition, "the courts [have been] all but unanimous in their refusal to read RICO as prohibiting only the infiltration of legitimate organizations . . ." *United States v. Altomare*, 625 F.2d 5, 7 n. 7 (4th Cir. 1980) (emphasis added). *See Sedima*, 473 U.S. at 495: RICO "makes it unlawful for any person — not just mobsters — to [violate its substantive provisions] through a pattern of racketeering activity."[2] "Pattern of racketeering activity" includes (1) violence, (2) provision of illegal goods and services, (3) corruption in the labor movement or among public officials, and (4) commercial and other forms of fraud. *Civil Action* at 300-06.

B. RICO Was Intended to Be Broadly Construed to Effectuate Its Remedial Purposes.

18 U.S.C. § 1962(a)-(d) sets forth "standards" of "unlawful" conduct, which are enforced through "criminal" and "civil" sanctions. Section 1963 sets out the criminal remedies. Section 1964 sets out the civil remedies.[3] Section 1962 states what is "unlawful," not "criminal." Because the

[2] *See also Oul Construction Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984), *cert. denied*, 469 U.S. 831 (1984).

[3] *See Sedima*, 473 U.S. at 491; *Basic Concepts* at 1027 n.71; *Civil Action* at 343 n.20.

scope of civil RICO is *broader* than the scope of criminal RICO, the statute is *not* primarily criminal and punitive, but primarily civil and remedial. *Sedima*, 473 U.S. at 496; *Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"); *see generally Civil Action* at 243 n.20.[4] RICO's civil remedies, based on a showing of the preponderance of the evidence, are available to the government or to the victims of racketeering activity themselves.[5]

Congress, moreover, directed that RICO "be liberally construed to effectuate its remedial purposes." 84 Stat. 947 (1970). *See Sedima*, 473 U.S. at 491 n.10, 497-98; *Russello*, 464 U.S. at 2.[6] The directive is a "mandate." *United States v. Long*, 651 F.2d 239, 241 (4th Cir.), *cert. denied*, 454 U.S. 896 (1981). This Court, too, has recognized Congress' plain

[4] *See also* 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska regarding S. 1623, the immediate predecessor to S. 1861, from which Title IX was drawn, "The criminal provisions are intended primarily as an adjunct to the civil provisions, which I consider as the more important feature of the bill."); 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska) ("principal value of . . . legislation is in its civil provisions"). Nevertheless, good faith commercial disputes do not implicate RICO, since they do not equate to *criminal* fraud. RICO does not involve strict liability, negligence, or constructive fraud. *Civil Action* at 244 n.23, 306 n.172, 334 n.216. RICO, through its predicate offenses, requires a *criminal* state of mind. *See, e.g., Durland v. United States*, 161 U.S. 306, 314 (1896) (good faith defense to mail fraud); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) (criminal fraud under RICO must be distinguished from civil fraud), *aff'd on other grounds*, 473 U.S. 606 (1985).

[5] *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (government suit), *cert. denied*, 420 U.S. 925 (1975); *Alcorn County, Miss. v. U.S. Interstate Supplies*, 731 F.2d 1160, 1169 (5th Cir. 1984) (victim suit). Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 Notre Dame L. Rev. 560 (1985).

[6] *See generally Equitable Relief* at 21; *Civil Action* at 245 n.25, 288 n.150.

intent. "RICO is to be read broadly," and it "is to 'be construed to effectuate its remedial purposes . . .' " *Sedima*, 473 U.S. at 497. "[RICO's] 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* In short, "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime . . . [and] it is in this spirit that all of the Act's provisions should be read." *id.*

C. RICO Was Intended to Encourage Civil Litigants to Enforce the Laws on Which RICO Is Predicated.

The private enforcement provisions of RICO were modeled on, but are not identical to, the antitrust laws. S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 1st Sess. 81 (1970).[7] Appropriately, the antitrust statutes have been termed the "Magna Charta of free enterprise." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). The antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Id.* A private "treble-damages remedy [is needed] . . . precisely for the purpose of encouraging *private*

[7] Congress passed the Sherman Act in 1890, yet it was not until recent times that the private enforcement mechanism of the antitrust statutes came into their own. The thrust of scholarly analysis of the Act's history placed that disuse at the door of "judicial hostility." Sullivan, *Breaking up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV., 17, 19 (1983). Advances occurred after the New Deal, but the private enforcement mechanism did not become an effective legal tool until key decisons of this Court in the 1950s. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). The historical parallels between the enforcement of the antitrust laws and RICO are haunting.

challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original). Such "private antitrust litigation is one of the surest weapons for effective enforcements of the antitrust laws." *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (quoting *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)). Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the antitrust statutes. *Reiter*, 442 U.S. at 344. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759, 2764 (1987) ("bring to bear the pressure of private attorneys general"); *Sedima*, 473 U.S. at 493 ("to fill prosecutorial gaps").[8]

Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators and provide[s] ample compensation to the victims . . ." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982). *See Sedima*, 473 U.S. at 495; *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*,

[8] In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, 85% were instituted by *private* plaintiffs. U.S. Department of Justice, *Source Book on Criminal Justice Statistics* 431 (1981). Professor (now Judge) Posner also argues forcefully on economic grounds for *private* enforcement of more than actual damages awards against all forms of deliberate antisocial conduct, particularly where the factor of concealment is present. Posner, *Economic Analysis of Law* 462 (private enforcement), 143, 272 (more than actual damage awards, for deliberate conduct), 235 (concealment) (2d ed. 1977). On the history and economic rationale of treble damages, *see Equitable Relief* at 530 n.17; Blakey, Editorial, RICO LAW REPTR. No. 11 (Jan. 1988). Beside Posner's analysis, the framing of this sort of equation has been entrusted by the constitution to the Legislative Branch. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975) (Rehnquist, J.) ("duty of the Judicial Branch . . . [is] to administer the law which Congress enact[s]").

731 F.2d 1160, 1165 (5th Cir. 1984) (Congress intended RICO's treble damage action to "provide strong incentives to civil litigants . . . in deterring racketeering . . ."). RICO's treble damage provisions were "intended by Congress . . . to encourage private enforcement of laws on which RICO is predicated." *Id.*[9]

The Organized Crime Control Act — including RICO — fits easily into a consistent pattern of Federal legislation enacted as general reform over the past half century or more aimed at a specific target, but drafted without limiting it to a specific target.[10]

[9]RICO and the antitrust statutes, moreover, are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." Kaysen & Turner, *Antitrust Policy* 17 (1959). RICO focuses on the first two; antitrust laws focus on the third. *See also American C. & L. Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exercised through force or fraud or agreement."). *See generally*, Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 533-43 (1986) ("(1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.").

[10]*See, e.g.*, 18 U.S.C. § 224 (sports bribery) held not limited to organized crime in *United States v. Walsh*, 544 F.2d 156, 159 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); 18 U.S.C. §§ 841-48 (explosives) held not limited to organized crime in *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979); 18 U.S.C. § 891 (loan sharking) held not limited to organized crime in *United States v. Keresty*, 465 F.2d 36, 43(3d Cir.), *cert. denied*, 409 U.S. 991 (1972); 18 U.S.C. § 1510 (obstruction of criminal investigation) held not limited to organized crime in *United States v. Koehler*, 544 F.2d 1326, 1330 n.6 (5th Cir. 1977); 18 U.S.C. § 1951 (extortion) held not limited to racketeering in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (Travel Act) held not limited to organized crime bribery in *Perrin v. United States*, 444 U.S. 37, 46 (1979); 18 U.S.C. § 1953 (lottery tickets) held not limited to organized crime in *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 21134(b) (bank robbery) held not limited to gangsters in *Bell v. United States*, 462 U.S. 356, 358-62 (1983); 18 U.S.C. § 2421 (white slave traffic) held not limited to commercial prostitution in *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917); 18 U.S.C. § 3575 (sentencing) held not limited to organized crime in *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982).

D. Narrow Interpretations of RICO Have Repeatedly Been Adopted by Lower Courts and Rejected on Appeal.

At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and hate-group prosecutions. *See Oversight on Civil RICO Suits, Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott) (cited as "Trott"). The Department of Justice has also begun to implement the civil provisions. *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985) (civil suit against organized crime controlled union), *cert. denied*, 106 S. Ct. 2247 (1986); Trott at 116-17.

The private bar did not begin to bring civil RICO suits until about 1975. When it did, the district courts reacted with extreme hostility and undertook judicially to redraft the statute in an effort to dismiss civil suits in all possible ways. The first effort to redraft civil RICO involved reading into it an "organized crime" limitation. *See, e.g., Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975). Because that limitation had no support in the text of the statute — it was also specifically voted down in the legislative debates — the 2nd, 5th, 7th and 8th Circuits quickly rejected it. *Alcorn County*, 731 F.2d at 1167 (cases cited).

The next effort involved reading a "competitive injury" limitation into the statute. *See, e.g., North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980). The 7th and 8th Circuits quickly turned this effort aside. *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied* 464 U.S. 1002 (1983) (the organized crime limitation "revived under . . . [a new] guise"); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982), *aff'd on rehearing en banc*, 710 F.2d 1361, *cert. denied*, 464 U.S. 1008 (1983).

Then the district courts developed the "racketeering injury" limitation. *See, e.g., Landmark Savings and Loan v. Rhoades*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981). It was, together with the criminal conviction limitation, a companion effort to circumscribe the plain text and the clear legislative history of RICO. Both limitations, adopted by a sharply divided 2nd Circuit, were repudiated by this Court in *Sedima*.

Ignoring the general teaching of this Court in *Sedima*, including that of footnote 14, lower federal courts have continued to dismiss most civil RICO cases. They have not sought, as this Court suggested, to develop a "meaningful" definition of the concept of "pattern," but to find an easy device to clear their dockets. *Equitable Relief* at 620 (complaint dismissed in 51% of post-*Sedima* reported decisions). Substitute "pattern" for "organized crime" or "racketeering injury" and the decisions continue in their pre-*Sedima* direction. The course threatens to frustrate Congress' 1970 promise of "enhanced sanctions and new remedies" for old wrongs. 84 Stat. 923. This appeal, therefore, focuses on developing a meaningful definition of "pattern" in the light of RICO's legislative history, text and purpose.

E. The Legislative History of RICO Does Not Support a Narrow Interpretation of Any of Its Provisions.

While the language of a statute must "ordinarily be regarded as conclusive," it can give way to a "clearly expressed legislative intention" to the contrary found in the statute's legislative history. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When RICO's legislative history is carefully and fully reviewed, however, it confirms that "Congress meant what it said." *INS v. Phinpathya*, 464 U.S. 183, 193 (1984). *See Civil Action* at 280.

Congress acted deliberately in its enactment of the Organized Crime Control Act — including civil RICO — and it had impressive advice during the process. The process originated in the hearings and reports of the Kefauver Committee, whose focus included infiltration by organized criminal elements into legitimate businesses.[11] The American Bar Association ("ABA") formed its Organized Crime Commission and participated actively, recommending model legislation, which included immunity, perjury, and syndicated gambling provisions.[12] In 1967, the President's Commission on Law Enforcement and Administration of Justice made the key recommendation that led to RICO, when it urged that Congress adopt antitrust-type remedies to control underworld activities, par-

[11] *See generally Basic Concepts* at 1014; *Civil Action* at 249.

[12] *See, e.g.*, 2 Organized Crime and Law Enforcement: Final Report by and Model Acts Prepared For the ABA Commission on Organized Crime 57-91 (syndicated gambling) and 157-86 (immunity) (1953); *Organized Crime Control: Hearings Before Subcomm. No. 5, House Comm. on Judiciary, 91st Cong., 2d Sess.* 579-85 (1970) (perjury) (hereinafter *House Hearings*).

ticularly in legitimate businesses.[13] In response, Senator Hruska and Congressman (now Judge) Poff introduced companion legislation that included criminal and civil sanctions and

[13] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society: Final Report* 208 (1967) ("techniques . . . especially valuable because they require a less rigid standard of proof").

The Commission also observed:

> [W]hite-collar crime [is] – [a term] now commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute [that] . . . are only rarely dealt with through the full force of criminal sanctions. . . .
>
> Serious erosion of morals accompanies [the white collar offender's] violation. [Those who so] flout the law set an example for other business and influence individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get. *Id.* at 47-48.

It commented on fraud:

> Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizable in gross but are also significant and possibly devastating for individual victims. *Id.* at 33-34.

In addition, it noted the changes in social and economic conditions within which the administration of justice had to be viewed:

> During the last few centuries economic life has become vastly more complex. Individual families or groups of families are not self-sufficient; they rely for the basic necessities of life on thousands or even millions of different people, each with a specialized function, many of whom live hundreds or thousands of miles away. *Id.* at 47-48.

See also Basic v. Levinson, 108 S. Ct. 978, 989-90 (1988) ("The modern securities market . . . differs from the face to face transactions contemplated by early fraud cases . . . .").

public and private enforcement mechanisms in both Houses of Congress. *See, e.g.*, S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17,999 (1967). The ABA carefully studied the bills and endorsed their concepts, including the private enforcement mechanism, but recommended that Congress draft them outside the antitrust statutes to give them a broader impact.

The ABA presented these recommendations to the House and the Senate in 1969.[14] Additionally, the National Commission on Reform of the Federal Criminal Law undertook similar studies.[15] The Commission included Congressman Poff, its vice-chairman, and Senators McClellan and Hruska, as well as Congressman (now Judge) Mikva. Subsequently, Senator Hruska and Congressman Poff drafted new legislation that took the ABA at its word. They introduced the new legislation in both Houses.[16] The Senate held hearings at which the ABA orally presented its favorable views.[17] The President also endorsed the legislation while it was being processed in the Senate and specifically called for antitrust-type remedies in his "Message on Organized Crime." *Senate Hearings* at 449 ("The injunction with its power of contempt and seizure, monetary fines and treble damages actions . . . suggest a new panoply of weapons. . . ."). As a result of these hearings, Senators McClellan and Hruska, after consultation with Congressman Poff, introduced S. 1861, which in its Statement of Findings and Policy was termed "remedial," and its "liberal

[14] *Measures Relating to Organized Crime:* Hearings Before the Subcomm. on the Judiciary, 91st Cong., 1st Sess. 259 (statement), 556 (report) (1969) (hereinafter *Senate Hearings*); *House Hearings* at 537 (statement), 147 (report). *See generally, Basic Concepts* at 1015; *Civil Action* at 254-56.

[15] *Civil Action* at 253 n.47 and accompanying text.

[16] *See, e.g.*, S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6,995-96 (1969).

[17] *Senate Hearings* at 259 (testimony of Rufus King for the ABA).

ly reported the RICO bill in its enacted language, which applied to "fraud" and included the treble damage enforcement mechanism. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-58 (1970). Dissenting Committee members, including Congressman Mikva, specifically objected to the private civil provisions' breadth. The dissenting members noted that the provisions were "a tool to be employed for all." *Id.* at 187. They also stressed the burden that their breadth might place on the courts, federalism, and legitimate businesses. *Id.* (courts); 116 Cong. Rec. 35,205 (1970) (statement of Cong. Mikva) (federalism); *id.* at 35,332 (statement of Cong. Mikva) (legitimate businesses). Despite these objections, the legislation passed the House by a vote of 341 to 26. 116 Cong. Rec. 35,363 (1970). After the Senate reconsidered it,[20] the

that might exist). So, too, does RICO. 84 Stat. 942 (1970) (not supersede Federal or State criminal or civil sanctions). Accordingly, there should be no concern about overlap with other remedies (as there was in *FLIP Mortgage Co. v. McElhane*, 841 F.2d 531, 538 (4th Cir. 1988) (narrow construction of "pattern" to avoid impact on state remedies).

[20] Significantly, when the Senate reconsidered the House-passed bill, Senator Dole illustrated the importance of civil RICO by describing a pattern of arson-murder visited on the A & P Tea Co. in an unsuccessful effort to sell it detergent. Senator Dole stated that the statute would impose "heavy" economic sanctions on such conduct, and it would serve as an "effective" deterrent. 116 Cong. Rec. 36,296 (1970). Obviously, RICO would do neither to this classic effort to infiltrate legitimate businesses by organized crime if the 8th Circuit's "single scheme" limitation were read into "pattern," since the effort to sell the detergent was, in fact, a "single scheme." It is doubtful, too, that this single arson-murder scheme would pass muster under either the jurisprudence of the 10th or the 4th Circuits. *See, e.g., Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 214 (10th Cir. 1987) (single discrete scheme not "pattern"); *FLIP Mortgage Corp. v. McElhane*, 841 F.2d at 538 (single business scheme not "pattern"); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073-74 (4th Cir. 1987) (single development scheme not "pattern"), *cert. denied*, 107 S. Ct. 706 (1988). Such a result is both "absurd" and "surpris-

construction" was mandated. 115 Cong. Rec. 9,568, 9,571 (1969).[18] The Organized Crime Control Act, which included S. 1861 in Title IX, then passed the Senate by a vote of 73 to 1. 116 Cong. Rec. 972 (1970).

While the legislation was pending in the House, the House Judiciary Committee was well aware of its scope. Indeed, the Association of the Bar of City of New York objected to its reach beyond "organized crime," including its application to "any securities fraud case."[19] Yet the House Committee deliberate-

[18] The statement of Finding and Policy did not mention "fraud." That consideration was added when the bill was reported out after the inclusion in the bill by the Senate Committeee of various additional predicate offenses, including mail and wire fraud and securities fraud. S. Rep. No. 617, 91st Cong., 1st Sess. 1, 21 (1969).

[19] *House Hearings*, at 294 ("sweep far beyond the field of organized crime"); 329 ("any securities fraud case"); *see generally, Civil Action* at 272-73.

An impression is apparently widespread in the securities industry that RICO "overlaps" all securities fraud. This impression is mistaken. RICO says "offenses" involving "fraud in the sale of securities" are "punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (1982). "Offense" means a breach of the *criminal* laws. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983) ("Criminal intent is . . . necessary to either mail fraud or securities fraud [under RICO]"). Accordingly, only the securities acts' *criminal* fraud provisions fall within RICO. *See, e.g.*, Securities Act of 1933 § 24, 15 U.S.C. § 77x (1982) ("willfully"); Securities and Exchange Act of 1934 § 32, 15 U.S.C. § 78ff ("'willfully"). Merely negligent or strict liability conduct does not fall within RICO. *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980) (intent to defraud rather than negligence in violations of § 17(a)(1) of the 1933 Act, § 10(b) of the 1934 Act, but not when engaging in untrue statements or omissions or transactions that operate as a fraud under § 17(a)(2) and § 17(a)(3) of the 1933 Act). Some overlap between statutes "is neither unusual nor unfortunate." *SEC v. National Securities, Inc.*, 393 U.S. 453, 468 (1969). Indeed, the securities acts envision it. *See, e.g.*, Section 28(a) of the Securities and Exchange Act of 1934 § 28, 15 U.S.C. § 78bb(a) ("rights and remedies" "in addition" to "any and all other rights"

President signed the Bill, as was expected in light of his earlier endorsement of its basic concepts.

F. The Text of RICO Does Not Support a Narrow Interpretation of the Pattern Requirement.

RICO does not define "pattern." Thus, "pattern" ought to be read in its plain or ordinary meaning, and interpreted in the context of the entire statute. *Sedima*, 473 U.S. at 495 n.13; *Russello*, 464 U.S. at 20, 21; *Turkette*, 452 U.S. at 580, 583 n.5 587. *See*, Equitable Relief at 535 n.37 (analyzing text of statute and lower court jurisprudence); note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83, 93-96 (1986) (cited with approval in *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 192 (9th Cir. 1987). Nothing in the text, legislative history or policy of the statute warrants the adoption of the sort of multiple scheme limitation read into the statute by the 8th Circuit.

G. Sedima's Footnote 14 Does Not Support the Eighth Circuit's Narrow Interpretation of the Pattern Requirement.

Apart from its observation that two acts may not be sufficient to form a "pattern," *Sedima's* footnote 14 is inclusive and not limiting. After an inconclusive survey of the relevant legislative history, this court said:

> Significantly, in defining "pattern" in a later provision of this same bill, Congress was more enlightening: "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the act. *C.S. Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed. 2d 616 (1975).

ing." *Turkette*, 452 U.S. at 587. Obviously, it is not what Congress – or Senator Dole – had in mind in 1970. *See also* 116 Cong. Rec. 607 (1970) (statement of Sen. Byrd) (arson-murder attempt to force A & P Tea Co. to buy detergent).

The above definition clearly is the definition of "pattern" that this Court favored in *Sedima*. The court says explicitly that Congress' action in adopting that definition was significant, and that that definition may be useful "in interpreting other sections of the act," including the pattern requirement of § 1962. Using the disjunctive "or," this court, in footnote 14, allowed at least six separate and independent grounds for finding a "pattern." That is consistent with the liberal, remedial understanding of the RICO statute presented by the court in *Sedima*. It would be anomalous for the court to have suggested a restrictive interpretation of "pattern" in a footnote when the spirit of the decision is remedial and broad.

II. A NARROW CONSTRUCTION OF RICO'S PATTERN REQUIREMENT WOULD DEPRIVE MANY CRIME VICTIMS OF A POWERFUL REMEDY

Article III of the Constitution does not grant a court power to redraft legislation because of its "appraisal of the wisdom and unwisdom of a particular [legislative] course . . . ." *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) (quoting *TVA v. Hill*, 437 U.S. 153, 194 (1978)).

Nevertheless, an examination of the policy considerations implicated by Congress' chosen course of action in 1970 is required by this Court's jurisprudence indicating that plain

meaning may be departed from to avoid absurd or surprising results. *See, e.g., United States v. Ryan*, 284 U.S. 167, 175-76 (1931) (civil forfeiture provision narrowed to give it "a sensible construction"). The language chosen by Congress in RICO is "neither absurd nor surprising." *Turkette*, 452 U.S. at 587. *See also In Re Rouse*, 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917) (Cardozo, J.) ("consequences cannot alter statutes but may help to fix their meaning.")

The current controversy over RICO has not centered on its criminal provisions or its possible civil application in the areas of violence, the provision of illicit goods and services, or the corruption of unions and governmental entities. Instead, the controversy has focused almost exclusively on the commercial fraud area. In 1970, however, Congress focused RICO on "fraud." 84 Stat. 922. It found that traditional "sanctions and remedies" were "unnecessarily limited in scope and impact." Id. at 923. It was well aware, in short, that "existing law, state and federal, was not adequate. . . ." *Turkette*, 452 U.S. at 586. Although almost two decades have passed since RICO became law, the task remains a formidable one.

In 1974, the Chamber of Commerce of the United States published a comprehensive study of fraud. The Chamber estimated the direct economic cost of fraud as follows:

	Billions of Dollars
1. Bankruptcy Fraud	.08
2. Bribery, Kickbacks & Payoffs	3.00
3. Consumer Fraud	21.00
4. Embezzlement	7.00
5. Insurance Fraud	2.00
6. Receiving Stolen Property	3.50
7. Securities Theft and Frauds	4.00

The total figure, including credit card and theft fraud ($1.10 billion) and computer-related crime ($.10 billion), was estimated at $41.78 billion annually.[21] Given the inflation rate since the 1974 study, fraud likely costs society a figure more than four times that high today.[22]

In addition, the Chamber of Commerce study did not account for the entire scope of the impact of fraud on the economy. By interacting with society's other problems, such as poverty and discrimination, white-collar crime has a "serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions."[23] Because white-collar offenders often occupy positions of trust, the effects of their misdeeds extend beyond their immediate impact, which often falls most harshly on the poor, aged and uneducated, as noted by the Crime Commission in 1967. Former FBI Director William H. Webster aptly commented in 1982: "[T]hrough use of their positions of trust, cunning and guile, white collar criminals undermine professional and government integrity to the dismay of all, and ultimately are responsible for the loss

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[21] United States Chamber of Commerce, *White Collar Crime: Everyone's Problem, Everyone's Loss* (1974) (cited as *White Collar Crime*). Obviously, these estimates can only be "ballpark" figures, for the typical perpetrator of a fraud does not file an honest "annual report." It has been accurately noted that "there is little systematic data available regarding the incidence of white collar crime," and two estimates of its cost have been cited: loss of taxes on $25 to $40 billion of unreported income annually and $500 million to $1 billion annually in securities fraud. President's Comm. on Law Enforcement & Admin. of Justice Task Force Report: *Crime and Its Impact – An Assessment* 103 (1967).

[22] Annual Report of the U.S. Attorney General 42 (1985) ($200 billion).

[23] *See generally* Edelhertz, *The Nature, Impact, and Prosecution of White Collar Crime* 6-7 (1970) (cited as Edelhertz).

of billions of dollars annually from the nation's economy."[24] Consumers, savers, investors, legitimate businesspeople and governments are the victims of fraud.

For instance, an estimated 15 to 20 percent of all insurance claims are fraudulent for a total loss of over $11 billion annually.[25] Because an insurance company must generate approximately $1.25 in premiums for every $1 it pays in claims, policy holders are paying an extra $13.75 billion in premiums annually because of fraud.

Arson-for-profit is a particularly costly part of the insurance fraud problem. In 1978, it was estimated that arson fraud caused losses of up to $2 billion a year and that 25% of each person's insurance bill goes to cover these losses.[26] More significantly, in 1975 alone, 1,000 deaths, including 45 firefighters, resulted from arson-for-profit schemes.[27]

Commodities and securities markets are tainted by fraud. It is estimated that $200 million is lost each year through commodity investment fraud.[28] Widespread reports of insider trading on Wall Street, too, have only recently highlighted a problem that costs investors, stockholders, and employees dearly, especially where corporate takeovers are involved.

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[24] *Hearings on the Department of Commerce, Justice, and State, The Judiciary and Related Agencies: Appropriations for 1983,* Before a Subcomm. of the Comm. on Appropriations, House of Representatives, 97th Cong., 2nd Sess. 1078 (1982).

[25] N.Y. TIMES, July 6, 1980, at 27, col. 1. These individual figures, too, are considerably higher than the 1974 general estimate of the Chamber of Commerce. *See supra* n.22.

[26] *Arson-for-Hire, Hearings before the Perm. Subcomm. on Investigations of the Senate Comm. on Government Affairs,* 95th Cong., 2d Sess. 7 (1978) (statement of Sen. John Glenn).

[27] *Id.*

[28] *See* Senate Comm. on Governmental Affairs, *Commodity Investment Fraud,* S. Rep. No. 495, 97th Cong., 2d Sess. V (1982).

Such abuse of insider information may well taint many of the 3,000 takeover transactions that occurred in 1986 alone, involving $175 billion.[29] The continuing federal investigation most likely "will vastly understate the total losses incurred by stock market investors, as well as many target companies that no longer exist and their acquirers who doubtless paid too dearly for them."[30]

A nationwide problem of bank failures caused by criminal conduct is also of "epidemic proportions."[31] From 1980 to 1981, 105 banks and savings and loan associations failed, costing taxpayers $1 billion. Subsequent failures are estimated to have added another $1 billion to the total.[32] A record 145 banks failed in 1986, and the figure was expected to increase by 25% for 1987. At least one half of bank failures and one quarter of thrift failures involve criminal activity by insiders.[34]

Fraudulent financial reporting is a serious national problem. Since 1980, major accounting firms have had to pay more than $180 million to settle liability suits.[35] When fraudulent financial reporting occurs, widespread consequences result, "with a sometimes devastating ripple effect."[36]

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[29] WALL ST. J., Feb. 17, 1987, at 27, col. 1. *See generally* BUS. WK., Mar. 3, 1987, at 28; NEWSWEEK, May 26, 1986, at 44.

[30] WALL ST. J., Feb. 17, 1987, at 27, col. 1.

[31] N.Y. TIMES, Jan. 22, 1987, at 45, col. 1.

[32] House Comm. on Government Operations, *Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions,* H.R. Rep. No. 1137, 98th Cong. 2d Sess. 5 (1984) (cited as *Insider Abuse*).

[33] N.Y. TIMES, Jan. 22, 1987 at 45, col. 1.

[34] *Insider Abuse* at 5.

[35] TIME, Sep. 21, 1986, at 61.

[36] Report of the National Commission on Fraudulent Financial Reporting 4 (1987).

Fraud against the government, not included in the Chamber of Commerce's study, costs anywhere from $2.5 to $25 billion.[37] In 1978, the Comptroller General reported that the opportunities for defrauding the government were "virtually unlimited."[38] A 1980 update concluded that the problem remained widespread.[39]

Ironically, the second circuit in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F. 2d 482 (1984), *rev'd* 473 U.S. 479 (1985), declaring the "extraordinary, if not outrageous" "uses to which private civil RICO has been put," cited E.F. Hutton & Co. among the "respected and legitimate" companies that have been sued. In 1986, Hutton pleaded guilty to 2,000 counts of mail fraud in a multi-million dollar bank scam. *See, e.g.*, BUS. WK., February 24, 1986, at 98, col. 1. In May 1988, Hutton agreed to plead guilty to two felony counts of money laundering and one of conspiracy. WASH. POST, May 7, 1988, at D11, col. 5. There is a substantial body of literature on white-collar crime by so-called respected business. *See, e.g.*, "How Lawless Are Big Companies?", FORTUNE, December 1, 1980, at 57 (1,043 major corporations between 1970 and 1980: 117 convictions or consent decrees on 98 antitrust violations; 18 kickbacks, briberies or illegal rebates; 21 illegal political contributions; 11 frauds; and five tax evasions).

The fraud problem facing the nation is overwhelming, but it is not unsolvable. If RICO is used with other law enforcement tools, it can emerge, as Congress intended, as an effec-

[37] N.Y. TIMES, May 17, 1982, at 11, col. 2 ("Fraud in Government benefit programs is now widely viewed to be a serious national problem . . . cost[ing] the public anywhere from $2.5 to $25 billion per year.").

[38] General Accounting Office, *Federal Agencies Can and Should Do More to Combat Fraud in Government Programs* i (1978).

[39] General Accounting Office, *Fraud in Government Programs: How Extensive Is It? – How Can it be Controlled?* (1980).

tive means for combatting fraud as well as other forms of sophisticated crime. For "[i]f substantial progress can be made in the prevention, deterrence and successful prosecution of . . . [white collar] crimes, we may reasonably anticipate substantial benefits to the material and qualitative aspects of our national life."[40]

Narrowing RICO would substantially cripple the statute's ability to achieve its remedial purposes. Congress recognized when it passed RICO in 1970 that existing jurisprudence was inadequate to deal with organized crime activities, including fraud. Society cannot rely, for example, upon public enforcement to bear the entire burden of policing fraud. Justice Jackson observed over 45 years ago that "[t]he criminal law has long proved futile to reach the subtle kinds of fraud at all, and able to reach grosser fraud, only rarely."[41] Public agencies charged with regulating fraud will never be funded or staffed at adequate levels.[42] Civil RICO's private enforce-

[40] Edelhertz at 11.

[41] Jackson, *The Struggle for Judicial Supremacy* 152 (Vintage ed. 1941). Fraudulent activities have increased dramatically since Justice Jackson's observation, and resources available for the investigation and prosecution of white collar crime remain scarce. Former FBI Director William Webster aptly commented in 1981 that "you speak to a thirsty man in the desert when you ask . . . [about resources]. Of course we need more resources consistent with the economy's ability to supply it and the willingness of the American people to dedicate it." *Waterfront Corruption: Hearings Before the Perm. Subcomm. on Investigations, Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 18 (1981).

[42] While the funding of the Securities and Exchange Commission has increased since 1979, its staffing has decreased and pending investigations are down. The number of shares traded on the New York Stock Exchange, however, has increased 300% since 1977. *See generally* General Accounting Office, *Statistics on SEC's Enforcement Program*, March 25, 1985.

Similarly, the 139.9 million futures contracts traded in 1983 is 15 times greater than the number traded in 1968. The resources of the Commodity Futures Trading Commission have nonethe-

ment mechanisms, therefore, play an essential role in reaching the fraud and other forms of criminal conduct that escape the criminal justice system. Accordingly, the statute's private civil provisions are necessary if the nation is successfully to combat and deter fraudulent activities. Private lawsuits with the threat of treble damages may, in fact, be more effective in combatting fraud than the threat of criminal penalties. Empirical studies, for example, show that it is the threat of treble damages, not criminal prosecution, that is the backbone of the antitrust statutes.[43] Testimony presented to Congress by the Department of Justice indicated:

> [C]ivil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in areas of organized criminality may have had a greater deterrent effect than is commonly recognized, and that both the threat and the actuality of private civil enforcement might be expected to produce even greater deterrence in the future. [Trott at 140-41 (emphasis added).]

Narrowing civil RICO would, therefore, deprive many fraud victims of a potent weapon for use against those who have wronged them. Courts ought not rewrite RICO and frustrate this remedial purpose.

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less remained relatively constant. The Commission is "thoroughly outgunned in the ongoing battle against commodity fraud." S. Rep. No. 495, 97th Cong., 2d Sess. 10 (1983).

[43] "Neither imprisonment nor monetary penalties pose . . . a credible threat to colluding firms . . .[t]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . ." Block, Nold & Sidale, *The Deterrent Effect of Antitrust Enforcement*, 89 J. Pol. Econ. 429, 440 (1981).

Nor is the potential for litigation abuse an acceptable reason for narrowing the scope of civil RICO.[44] Allegations of civil RICO abuse should be dealt with by enforcing vigorously the existing remedies for general litigation abuse. RICO abuse will not be a problem so long as attorneys and the courts "recognize the utility of existing remedial procedures."[45] The courts, too, should also be alert to the fact that "abuse arguments are more likely motivated by hostility to the RICO remedy"[46] than by the character of the suit. As Justice Stevens observed in the context of the antitrust laws, "[F]rivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine." *Hoover v. Ronwin*, 466 U.S. 558, 601 (1984) (Stevens, J., dissenting). He continued:

> Our legal system has developed procedures for speedily disposing of unfound claims; if they are inadequate to protect [individuals] from vexatious

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[44] Those who express this concern have the burden of proving:

1) that a *substantial* number of frivolous RICO suits are being filed,

2) that *existing* safeguards against such suits are not adequate to remedy them,

3) that *new* safeguards against such suits that are adequate *cannot* be designed, and

4) that the detriment from these suits *outweighs* the benefit from legitimate suits.

None of these burdens has been met.

[45] Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. Rev. 55, 103 (1984). (cited as *RICO Abuse*). The 1983 meeting of the United States Judicial Conference concluded that "the existing tools [to address frivolous litigation] are sufficient, but perhaps not fully understood or utilized." *Report of the Proceedings of the Judicial Conference of the United States*, September 21-22, 1983, at 56.

[46] *RICO Abuse* at 104.

litigation, then there is something wrong with those procedures, not with the law . . . . *Id.*

Finally, lower courts have frankly acknowledged that their narrow reading of RICO is motivated in part by a fear of a "flood of litigation." *See, e.g., McCarthy v. Pacific Loan, Inc.*, 600 F.Supp. 137, 139 (D. Haw. 1984). Such fears are misplaced factually and are constitutionally inappropriate.

The perceived problem of the civil RICO case load is exaggerated.[47] Of the approximately 160,000 private civil suits filed in federal courts each year, considerably fewer than 5,000 are even potential RICO cases.[48] This potential figure would represent, if fully realized, less than 3% of all federal filings. Moreover, over 58% of the reported civil RICO cases filed between January 1, 1985 and December 31, 1986 had an independent basis for federal jurisdiction.[49] Thus, many civil RICO cases would have found their way to the federal courthouse in any event.

But more importantly, the possibility that litigation might be a burden on courts is "not sufficient to justify a judicial decision to alter [a] congressionally [drafted remedial scheme]." *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 512 n.13 (1982). It is a legislative function to resolve "the

[47] *See* 2 Civil RICO Report No. 34 at 3. (Feb. 4, 1987) (remarks of Judge Pamela A. Rymer).

[48] *See* Annual Report of the Director of the Administrative Office of the U.S. Courts (1985). Securities, commodities and exchange related findings include 3,200 civil cases. *Id.* at A-13 & A-46. Fraud-related litigation accounts for 1,700 civil filings. *Id.* at A-12. If all these securities and fraud cases were also RICO cases, RICO filings would not exceed 5,000. In fact, Administrative Office data indicate that RICO filings are only running from 85 to 90 per month. *Equitable Relief* at 622.

[49] *Equitable Relief* at 619.

pros and cons of whether a statute should sweep broadly or narrowly." *United States v. Rodgers*, 466 U.S. 475, 484 (1984). Congress resolved those "pros and cons" when it stated unambiguously that RICO is to be construed broadly. While "[t]he sweep of RICO is admittedly broad . . . [a court's] function is to apply the language of the statute as drafted in Congress, not to rewrite the statute as [the court] might prefer it to be." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 974 (7th Cir. 1986). A court may not restrict the scope of civil RICO simply because it may dislike the statute's "extraordinary breadth." *Id.* at 977.[50] In short, if RICO is to be narrowed, it should be narrowed by Congress, not the judiciary.[51]

CONCLUSION

Congress directed in 1970 that RICO be liberally construed to effectuate its remedial purposes. One of RICO's remedial purposes is to provide fraud victims with a private cause of action. Civil RICO's private enforcement mechanisms are necessary if victims of fraud are to be compensated for crimes perpetrated against them. This Court should, therefore, resist the efforts of the lower courts to construe civil RICO narrowly and follow Congress's liberal construction mandate.

Respectfully submitted,

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[50] *See generally*, Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982).

[51] Congress is processing legislation. *See generally*, Note, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO*, 19 LOY. L.A. L. REV. (1986) for a review of the various proposals.